TING YU ING & ANOR v. GOH TZE NAM

HIGH COURT SABAH & SARAWAK, KUCHING
ALWI ABDUL WAHAB JC
[CIVIL APPEAL NO: KCH-12B-4-5-2015]
9 OCTOBER 2015

CONTRACT: *Agreement – Loan agreement – Friendly loan – Default in payment – Execution of loan agreements, security documents and memorandum of transfer – Whether valid – Whether borrowers had intention to transfer property to lender – Whether terms in loan documents explained to borrowers – Conduct of lender – Whether suspicious – Whether lender had fraudulent intention to acquire borrowers' property – Whether borrowers bound by terms of documents executed by them – Whether transfer of property to lender valid – Whether borrowers entitled to redeem property upon settlement of loan sum*

The appellants jointly owned a property ('the said property') and resided in it. The facts revealed that in 2008, upon the appellants' request, the respondent offered a friendly loan of RM80,000 to the former as they were in need of some funds. As a result, two loan agreements *cum* security documents were executed by the parties. Further, the appellants also signed two sets of Memorandum of Transfers ('MOTs') to effect the transfer of the said property to the respondent. Since there was a default in the settlement of the loan, the respondent agreed to purchase the said property from the appellants for a valuable consideration of RM80,000 in settlement of the said loan. However, the appellants continued to occupy the said property despite their default in settling the loan to the respondent. In the Sessions Court, the appellants' suit for reliefs and declarations in relation to the said property was dismissed and the respondent's counterclaim for possession of the said property was allowed. Hence, this appeal. The appellants argued, *inter alia*, that (i) they never consented to the transfer of the said property to the respondent in default of the settlement of the loan; (ii) the purported MOTs were a sham and unlawful; (iii) they went to the respondent's lawyer's office on one single occasion to sign the loan agreements *cum* security documents and had only met the staff there; and (iv) the documents signed by them were undated. The respondent, on the other hand, contended that (a) he was the registered proprietor of the said property; (b) the appellants had willingly pledged the said property as collateral for the loan; (c) the appellants failed to discharge their legal burden to prove that the purported MOTs were a sham and unlawful; and (d) the appellants were bound by the contents of the documents signed by them.

Held (allowing appeal with costs):

(1) Clause 6.2 of the loan agreement gave the respondent the right to caveat the said property in the event of default of payment by the appellants. This clause was part of the loan agreement and together with the other clauses which contained various terms as stated and agreed. The fact that the caveat was lodged by the respondent on 27 May 2008, *ie*, one day after the execution of the loan agreements raised suspicion of the respondent's fraudulent intention to acquire the title of the said property from the appellants even before the default occurred (*Ang Tuan Hock v. Lim Keng Thean & Anor*; refd). (para 22)

(2) Clause 4 of the loan agreement stated that the appellants shall execute the security documents and from time to time, the appellants shall execute additional loan documents to satisfy the respondent's security interest. However, from the plain reading of this clause, there was nothing stated about the fact that the MOTs were to be executed for the purpose of the transfer of the said property. Neither cl. 6 of the security document specifically stated that the appellants had to execute the MOTs to transfer the title of the said property to the respondent. (para 23)

(3) The facts surrounding the event of the signing of the loan agreements raised some suspicious and dubious circumstances. The fact that the loan agreements and other related documents were undated when they were signed and the appellants only went to the respondent's lawyer's office on one single occasion showed that the MOTs were signed on the same day when the loan agreements and security documents were executed. This was wrong as it went against the plain and ordinary meaning of the loan agreements and security documents. The respondent had used these documents to achieve his deceitful end by inducing the appellants to sign the MOTs when the time for repayment of the loan was still continuing (*Palaniappa Chettiar v. Arunasalam Chettiar*; refd). (para 24)

(4) The nature, terms and effect of the clauses in the loan agreements and security documents were not explained to the appellants. Further, the appellants did not agree to transfer the said property to the respondent. The burden shifted to the respondent to adduce evidence that the execution of the loan documents and the security documents were properly explained to the appellants and that their signature was witnessed by the respondent's lawyer. The lawyer was appointed by the respondent and all the related documents were prepared by them. As such, it was reasonable to expect the respondent to call his lawyer in order to inform the court as to what transpired on that day and the sequence of events at the time of signing until the transfer of the said property to the respondent. (paras 25 & 26)

(5) There was no evidence to prove that the appellants had consented to the transfer of the said property. The sum of RM80,000 was received by the appellants as a loan from the respondent and not as the purchase price for the sale of the said property. As such, the transfer of the said property to the respondent *vide* the MOTs was not a regular transaction in the absence of the clear terms in the loan agreements and security documents. (paras 28-30)

(6) The appellants proved their case on a balance of probabilities. In the circumstances, the loan agreement, security documents and MOTs were not valid and set aside. The appellants were entitled to redeem the said property upon payment of RM80,000 to the respondent (*Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd*; refd). (paras 31 & 32)

Case(s) referred to:
Ang Tuan Hock v. Lim Keng Thean & Anor [2012] 1 LNS 962 CA ***(refd)***
Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***
Narayanan v. Official Assignee, Rangoon AIR 1941 PC 93 ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tengku Zahara Tengku Chik v. Che Yusoff Che Mat [1950] 1 LNS 91 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the appellants - Shankar Ram (Daniel Ling with him); M/s Thomas, Shankar Ram & Co
For the respondent - Jammie Tai; M/s Tang & Partners

Reported by Kumitha Abd Majid

JUDGMENT

Alwi Abdul Wahab JC:

Introduction

[1] This is the plaintiffs' ('appellants') appeal against the decision made by the learned Sessions Court Judge ('SCJ') after a full trial in dismissing the appellants' claim and allowing the defendant's ('respondent') counterclaim. A total cost of RM16,000 was awarded to the defendant.

[2] The appellants' claim in Sessions Court was for reliefs and declarations relating to all that parcel of land together with the building thereon and appurtenance thereof situate at Padungan Road Kuching, containing an area of 222.6 square metres more or less and described as Lot 93 Section 47 Kuching Town Land District ('the said property').

A **Facts Of Case**

[3] The undisputed facts are that both the appellants ie, Ting Yu Ing @ Ding Yu Ying and Liyana Wong binti Abdullah are mother and daughter respectively and both reside in the said property jointly owned by them in one-half (1/2) share each. The said property was the appellants' family
B home for the past 43 years after it was left to them by their late husband/ father who died on 10 May 2000 ('the deceased').

[4] Sometimes in year (May) 2008, the appellants needed some fund to settle the estate matters of the deceased when they were introduced by the
C late (Ms) Choo Pei Ling to the respondent who was willing to offer them a friendly loan of RM80,000. For that purpose, both the appellants and the defendant signed two loan agreements cum security documents both dated 26 May 2008 and 27 June 2008 respectively ('exh. DB1 (1-16)').

[5] The appellants also signed two sets of Memorandum of Transfer
D Instrument No. L 25/45/2008 of 10 September 2008 and L 25/46/2008 of 10 September 2008 respectively ('exh. DB1 (17-20)') to effect the transfer of the said property to the respondent. The two sets of memorandum of transfer are collectively called the MOTs. The appellants, however, disputed that they ever consented to the transfer of the said property to the
E respondent in default of settlement of the loan.

[6] The respondent's loan of RM80,000 was never paid by the appellants and the appellants are still occupying the said property until now. The respondent subsequently offered to sell the said property to the appellants at a mark-up price of RM450,000 pursuant to the letter of offer from the
F respondent's lawyer dated 23 April 2013 ('exh. PB2 (30)').

The Appellants' Submission

[7] The appellants submit that the learned SCJ had erred in fact and law when he failed to hold that the purported MOTs were sham and unlawful due to the respondent's false representation in breach of the verbal
G agreement between the appellants and respondent.

[8] The appellants contend that they had been misrepresented by the respondent in giving up the title of the said property to the respondent believing that the loan agreements and the security documents were executed
H by them merely to give effect to the pledge of the said property as security for the loan as had been verbally agreed.

[9] The appellants submit that they went to the respondent's lawyers' office to sign the loan agreements cum security documents. This happens on one single occasion and during this occasion they were met with the
I respondent's lawyers' office staff only.

[10] The appellants further submit when they signed the documents at the respondent's lawyer's office, the documents were all undated and the respondent was absent at the time of the signing of the MOTs. The respondent failed to call any witnesses to explain the manner how the loan agreements, security documents and the MOTs were signed and executed.

[11] The appellants contend that the respondent should not proceed with the MOTs but should lodge a caveat pursuant to cl. 6 of the security documents. Although caveat was lodged by the respondent, it was premature and too soon before the event of default by the appellants.

[12] The appellants case is that the loan agreements and the security documents do not provide for any reference to MOTs but for the purpose of creating legal charge as a collateral to the loan.

Respondent's Submission

[13] The respondent submits that the appellants had willingly pledged the said property as collateral for the loan. As the appellants were unable to repay the said loan to the respondent within the time stipulated under the loan agreements, the respondent agreed to purchase the said property from the appellants for a valuable consideration of RM80,000 in settlement of the said loan.

[14] Although the respondent became the registered proprietor of the said property the appellants refuse to give up possession of the said property to the respondent. Thus, the respondent's counterclaim against the appellants was for the possession of the said property.

[15] The respondent submits that the standard of proof in the case of fraud is beyond reasonable doubt and the appellants failed to discharge their legal burden to prove that the purported MOTs were sham and unlawful due to respondent's false representation (*Narayanan v. Official Assignee, Rangoon* AIR 1941 PC 93; *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121).

[16] The respondent submits that the appellants failed to adduce evidence to show the existence of the so-called 'verbal agreement' other than the loan agreements cum security documents as shown in exh. DB1 (1-16).

[17] The respondent submits that the execution of the MOTs does form part of the terms in the loan agreements cum security documents by virtue of cls. 4 & 6 therein. Under the said clauses, the appellants are required to execute additional loan documents which are reasonably necessary to perfect the respondent's security interest.

[18] The respondent submits that the appellants who chose to sign the said documents without first checking it or seeking independent advice are bound by the contents therein. The respondent cited the case of *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640, where James Foong J (as he then was) said:

A ... A person who choose to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and he is prevented from denying the contents therein do not bind him.

[19] The respondent further submits that it is crucial for the appellants to
B call Jennifer Chen who had personal knowledge of what was transpired between the appellants and the respondent. The appellants failure to call Jennifer Chen or any of the staff in Messrs Michael Ong & Chang would invite the invocation of s. 114(g) of Evidence Act 1950 that their evidence if called would be less favourable to the appellants.

C **[20]** The respondent also submits that the appellants could not raise the issue on default clause under the loan agreements as it was never pleaded in the appellants' claim and only came to light during the cross-examination of the respondent.

D **[21]** The respondent further submits that the right of redemption of the said property does not arise because the loan is still unpaid and the respondent had rightfully transferred the said property into his name due to the appellants' default in repayment of the loan.

Court's Findings

E **[22]** Clause 6.2 of the loan agreement gives the respondent the right to caveat the said property in the event of default of payment by the appellants. This clause is part of the loan agreement and together with the other clauses containing various terms as stated and agreed therein are meant to be complied with by both the appellants and the respondent.
F Further, this loan agreement and security documents are prepared by the respondent's lawyer, produced before the court, tendered and marked as an exhibits. As such, I don't see why the appellants could not refer to it although it was not pleaded in the appellants' claims. The fact that the caveat in the instant case was lodged by the respondent on 27 May 2008 ie,
G one day after the execution of the loan agreements (p. 232 of the appeal record, part 'C') can only raise some suspicious of the respondent's fraudulent intention to acquire the title of the said property from the appellants even before the default has occurred (*Ang Tuan Hock v. Lim Keng Thean & Anor* [2012] 1 LNS 962; [2014] 2 MLJ 109).

H **[23]** Clause 4 of the loan agreement states that the appellants shall execute the security documents and from time to time, the appellants shall execute additional loan documents to satisfy the respondent's security interest. It is interesting to note however, from the plain reading of this clause, there is no mention of any MOTs are to be executed for the purpose of the transfer
I of the said property. Neither cl. 6 of the security document specifically mention for the appellants to execute the MOT for purpose of transferring

the title of the said property to the respondent. It merely says that the appellants shall execute such other agreements, documents or interest in connection with this security documents upon request by the respondent.

[24] The facts surrounding the event of the signing of the loan agreements also raised some suspicious and dubious circumstances. The appellants submit that the loan agreements and the other related documents were undated when they were signed. This was not disputed by the respondent. The appellants also confirmed that they went to the respondent's lawyer's office only on one single occasion which was also not rebutted by the respondent. Relying on this unrebutted evidence, it is my finding of fact that the MOTs must have been signed on the same day when the loan agreements and security documents were signed. In my view this is completely wrong as it goes against the plain and ordinary meaning of the loan agreements and security documents particularly cls. 4 and 6 of the loan agreements and the security documents respectively. It is patently clear from the facts of the case that the respondent had used the loan agreements and the security documents to achieve his deceitful end by inducing the appellants to sign the said undated MOTs when the time for repayment of the loan was still continuing (*Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] 1 MLJ 143).

[25] The appellants' evidence was that they went to the respondent's lawyers' office but they only met the respondent's lawyer's staff and not the lawyers. Hence, when they signed the loan agreements and security documents, they were not explained on the nature, the terms and effect of the clauses found therein. Nevertheless, they did so on the belief that the documents were merely to set out the loan and to give effect to the pledge of the said property as security for the loan as agreed. At no times that they had agreed to transfer the said property to the respondent.

[26] Having said that, in my view, the burden therefore shifted on the respondent to adduce evidence that the execution of the loan documents and the security documents were properly explained to the appellants and that the appellants' signature was witnessed by the respondent's lawyer, one Jennifer Chen from Messrs Michael Ong and advocates. I am saying so because Messrs Michael Ong was the lawyer appointed by the respondent and all the related documents were prepared by them. It is reasonable to expect the respondent to call his lawyer to inform this court on what was transpired on that day and the sequence of events at the time of signing until the transfer of the said property to the respondent.

[27] What transpired during the signing of the loan agreement is further clouded in the light of the inconsistent evidence of the respondent in the court and in his pleaded case in the amended defence and counterclaim (para. 6 (a)). In the latter, he stated that he was present but in court he said

he was not there at the time of the signing of the loan agreement by the appellants. If it is true that he was not there at the time of the signing of the loan agreements, how can he said so conveniently that the loan agreements and the security documents were properly read and explained to the appellants by his lawyer? It is therefore important for the respondent to call his lawyer ie, Jennifer Chen and the staff in the lawyer's office to counter the allegation by the appellants that they did not get to see the lawyer but the staff of that lawyer's office and the documents were not properly explained.

[28] In the circumstances, I cannot say that the appellants were aware of what they were signing for, particularly on the transfer of the said property to the respondent. There was no evidence to prove that the appellants had consented to the transfer of the said property. There was a police report lodged by the appellants on 4 April 2013 (p. 322 of appeal record part 'C') stating that they were threatened by the respondent as they failed to repay the loan pursuant to the loan agreements and the security documents that they had signed on.

[29] It is not correct to say that respondent is entitled to purchase the said property for valuable consideration of RM80,000 as the appellants had defaulted the payment of the loan. The money was received by the appellants as loan from the respondent and not as the purchase price for the sale of the said property.

[30] In the final analysis, in my view the transfer of the said property to the respondent *vide* the MOTs was not a regular transaction but an irregular one in the absence of the clear terms in the loan agreements and security documents. It is beyond one's imagination for the appellants who need a shelter of their own would want to let go the said property for a meagre sum of RM80,000 well below the market value. In *Tengku Zahara Tengku Chik v. Che Yusoff Che Mat* [1950] 1 LNS 91; [1951] 1 MLJ 6, the court granted the plaintiff the right to redeem her land which worth double than the amount lent from the defendant.

[31] In the recent Federal Court case ie, *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584, the standard of proof for the case of fraud is on the balance of probabilities. In the present case and based on my above consideration, the appellants have proven their case on a balance of probability. The appellants' appeal is therefore granted.

Conclusion

[32] In the result, I allow the appellants' claim against the respondent for declarations as follows:

(i) the loan agreements and the security documents both dated 26 May 2008 and 27 June 2008 respectively were not valid and ought to be set aside.

(ii) the MOTs both dated 10 September 2008 were not valid and ought to be set aside.

(iii) the land register to be rectified to reflect the appellants as joint owner in one-half share each of the said property, and

(iv) the appellants are entitled to redeem the said property upon payment of RM80,000 to the respondent.

[33] As regards to the appellants' claim of RM1,259,350 being the payment of interest that were alleged to have been made by the appellants to the respondent, I refused to allow such claim for the reason that there is no evidence to prove that there was actual payment made to the respondent. The entries of bank statements produced by the appellants are no doubt showing certain sum of moneys were withdrawn or debited but that certain sum of moneys could be withdrawn by the appellants for various other purposes which the court could not speculate.

[34] I award costs for the appellants of RM10,000 for this appeal.